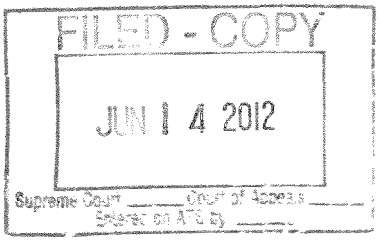
6-14-2012

Silicon Intern. Ore, LLC v. Monsanto Co. Respondent's Brief 1 Dckt. 39409

IN THE SUPREME COURT OF THE STATE OF IDAHO

SILICON INTERNATIONAL ORE, LLC, Plaintiff-Appellant, vs. MONSANTO COMPANY and WASHINGTON GROUP INTERNATIONAL, INC., Defendants-Respondents.	)	Supreme Court No. 39409-2011



BRIEF OF RESPONDENT WASHINGTON GROUP INTERNATIONAL, INC.

Appeal from the District Court of the Sixth Judicial District
of the State of Idaho, in and for the County of Caribou

Honorable Mitchell W. Brown,
District Judge

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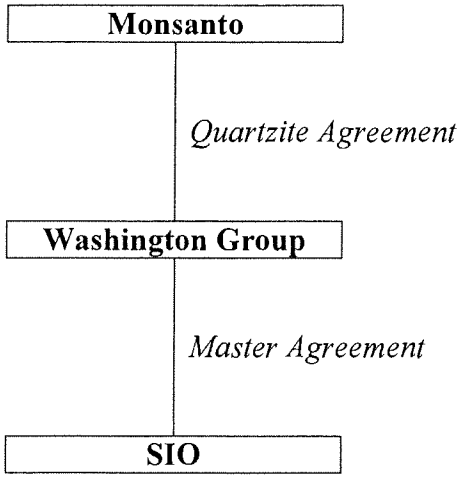
STATEMENT OF THE CASE

A. Nature Of The Case.

In late 2000, Plaintiff-Appellant Silicon Ore International, LLC ("SIO") went into business processing and selling silica tailings, which are a byproduct of mining operations at a Soda Springs quartzite quarry of Defendant-Respondent Monsanto Company ("Monsanto"). At that time, Defendant-Respondent Washington Group International, Inc. ("Washington Group"), on whose behalf this brief is submitted, was operating the quarry, as it had done for many years under its Quartzite Agreement with Monsanto. SIO gained the right to do business at the quarry under its Master Agreement with Washington Group because Washington Group separately had obtained Monsanto's contractual blessing for SIO's presence at the quarry in an addendum to the Quartzite Agreement. Thus, a two-tiered contractual structure was in place, similar to that which is often used for construction projects (where an owner hires a general contractor, which in turn hires its own subcontractors, without contracts between the subcontractors and the owner):



SIO's presence at the quarry over the years offered little benefit to Monsanto and Washington Group. In fact, it was more trouble than it was worth. Consequently, in late 2007—more than two years after the expiration of SIO's five year contractual right to conduct business at the quarry—Washington Group gave SIO notice that it must vacate the quarry. SIO wanted to stay and asked Monsanto to overrule Washington Group, but Monsanto would not do so.

Tax returns prove that SIO lost money every year it operated at the quarry. Nevertheless, SIO sued Monsanto and Washington Group on a variety of contract and tort theories, contending it was wrongfully made to leave the quarry shortly before it supposedly would have enjoyed a truly remarkable change for the better in its financial fortunes. Headlining SIO's claims against Monsanto is a claim that—contrary to the two-tiered contractual structure in place—Monsanto had an oral contractual obligation to allow SIO to remain at the quarry indefinitely. SIO's main claim against Washington Group is for tortious interference with Monsanto's performance of that alleged contractual obligation. Despite that its business was a proven money-loser, SIO claims its ouster from the quarry resulted in $25 million in lost profits.

B. Course Of Proceedings.

SIO filed this action on December 31, 2009. (R. Vol. 1, p. 1.) Its complaint included four claims against Monsanto and two claims against Washington Group. (R. Vol. 1, pp. 1-20.)

The lead claim was that Monsanto breached an oral contract it allegedly made with SIO in May 2000, which required it to furnish silica tailings in quantities to be separately agreed for SIO to process at the quarry, in return for which SIO would pay royalties at a rate to be separately agreed. (R. Vol. 1, pp. 3-4, 10.) The alleged oral contract entitled SIO to conduct business at the quarry for so long as doing so was "mutually beneficial"—a standard that would

be satisfied if SIO followed Monsanto's environmental rules, paid royalties as separately agreed, and sold processed silica tailings only in markets approved by Monsanto. (R. Vol. 1, p. 4.) SIO claimed that Monsanto had no right to terminate the alleged oral contract while it was "mutually beneficial" under that standard. (R. Vol. 1, p. 10.)

SIO's three other claims against Monsanto also revolved around the notion that Monsanto had no right to require SIO to vacate the quarry. (R. Vol. 1, pp. 11-16.) SIO claimed that the alleged oral contract's termination violated the implied covenant of good faith and fair dealing, as well as that Monsanto was estopped—under the doctrines of both equitable estoppel and quasi-estoppel—from making SIO leave the quarry while its presence there was "mutually beneficial." (R. Vol. 1, pp. 11-16.)

The first of SIO's two claims against Washington Group was that Washington Group breached the covenant of good faith and fair dealing implied by law into the December 1, 2000 Master Agreement between Washington Group and SIO. (R. Vol. 1, p. 16.) The Master Agreement (R. Vol. 3, pp. 318-27) set the terms under which SIO could conduct business at the quarry. (R. Vol. 1, pp. 4-5.) SIO could not point to any breach of the Master Agreement's express terms, but claimed that Washington Group hindered SIO's work at the quarry and conspired with Monsanto to take over SIO's business, in breach of the attendant implied covenant of good faith and fair dealing. (R. Vol. 1, p. 16.)

SIO also claimed that Washington Group committed tortious interference with the alleged SIO/Monsanto contract. (R. Vol. 1, pp. 17-18.) The factual basis for that claim was the same as for the implied-covenant claim: Washington Group allegedly hindered SIO's work at

the quarry, and it allegedly persuaded or conspired with Monsanto to remove SIO from the quarry so that it could take over SIO's business. (R. Vol. 1, p. 17.)

After SIO took several depositions of current and former Monsanto and Washington Group personnel (R. Vol. 4, pp. 501-26, 568-655), Monsanto and Washington Group moved for summary judgment. (R. Vol. 1, pp. 79-81, Vol. 2, pp. 247-49.) Monsanto argued, among other things, that (1) the alleged SIO/Monsanto contract was too indefinite and uncertain to constitute an actual contract, (2) it was voidable under the Uniform Commercial Code ("UCC") statute of frauds because it was an oral contract for the sale of goods (*i.e.*, silica tailings) valued at more than $500, and (3) SIO could not prove damages. (R. Vol. 1, pp. 89-94.) Washington Group made arguments parallel to Monsanto's first and third arguments, plus it argued that SIO's implied-covenant claim ran contrary to the Master Agreement's express terms and that the interference claim was untenable to the extent it alleged mere hindrances of SIO's performance not resulting in a breach of the alleged SIO/Monsanto contract. (R. Vol. 2, pp. 256-63.)

SIO, of course, opposed the motions for summary judgment. (R. Vol. 3, pp. 357-408.) Part of its opposition was an affidavit by a proffered accounting expert, who opined that SIO's ouster from the quarry resulted in lost profits of more than $25 million. (R. Vol. 3, pp. 409-36.)

On September 21, 2011, the district court issued a decision granting the motions for summary judgment. (R. Vol. 5, pp. 777-98.)

The district held the alleged SIO/Monsanto contract unenforceable under the UCC statute of frauds, without reaching Monsanto's argument that it was too indefinite and uncertain to be an actual contract in the first place. (R. Vol. 5, pp. 786-89.) On that basis, the district court granted summary judgment against SIO's claims for breach of the alleged SIO/Monsanto contract and its

implied covenant of good faith and fair dealing. (R. Vol. 5, p. 789.) Further, the district court granted summary judgment to Monsanto on SIO's estoppel claims, finding no evidence Monsanto had made false representations or changed positions. (R. Vol. 5, pp. 789-92.)

As to SIO's implied-covenant claim against Washington Group, the district court held that SIO failed to offer any evidence of recoverable damages. (R. Vol. 5, pp.795-97.) Although Washington Group's alternative argument (that the implied-covenant claim ran contrary to the Master Agreement's express terms) offered the district court an opportunity to reach the same result on more than one ground, the district court did not take that opportunity. Instead, without meaningful explanation, it did not accept that alternative argument. (R. Vol. 5, p. 795.)

Finally, as to SIO's interference claim, the district court did not reach the arguments Washington Group offered. Instead, the district court granted summary judgment on the ground that the record contained no evidence Washington Group knew of the alleged SIO/Monsanto contract, with which it allegedly had interfered. (R. Vol. 5, pp. 793-94.)

The district court's complete grant of summary judgment to Monsanto and Washington Group was made final in a judgment entered on October 7, 2011. (R. Vol. 5, pp. 799-801.) SIO filed its notice of appeal on November 18, 2011. (R. Vol. 5, pp. 802-07.)

On March 9, 2012, the district court entered a decision awarding Monsanto $78,072.42 and Washington Group $86,481.83 in costs and attorney fees under Idaho Code § 12-120(3). (Addendum A, *infra.*) A corresponding judgment was entered on March 20, 2012. (Addendum B, *infra.*[1])

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[1] On June 12, 2012, Washington Group moved to augment the record with the district court's decision and judgment awarding costs and attorney fees. That motion is pending.

C. Statement Of Facts.

Monsanto's corporate family owns a quartzite mine in Soda Springs. (R. Vol. 2, p. 138.) In 1993, Monsanto signed a Quartzite Agreement under which the mine would be operated by a Washington Group predecessor (Conda Mining Inc.) through the end of 2002. (R. Vol. 2, pp. 139, 145-72, 174-75.) The Quartzite Agreement calls the mine the "Quarry" (R. Vol. 2, p. 145), and that is what it will be called for the balance of this brief. The quartzite rock yielded by the Quarry is commonly called "silica." (R. Vol. 2, p. 138.) Operating the Quarry involves crushing and screening silica, each year generating more than 100,000 tons of silica sand as a byproduct. (R. Vol. 2, pp. 138-39.)

SIO approached Monsanto in early 2000 about buying the Quarry's silica-sand byproduct (R. Vol. 2, p. 140), which will be called "silica tailings" in this brief. Three-way discussions between SIO, Monsanto, and Washington Group were held on that subject. (*Id.*) In May 2000, SIO proposed a twenty year written contract to Monsanto, under which Monsanto's silica tailings would be sold to SIO and space at the quartzite mine would be rented to SIO, so that SIO could process the silica tailings through Washington Group. (R. Vol. 2 , pp. 140, 237-38.) Monsanto and SIO, however, never entered into any such contract. (R. Vol. 2, pp. 140.)

Instead, the parties created a two-tiered contractual structure.

The first contractual tier comprised the preexisting Quartzite Agreement between Monsanto and Washington Group's predecessor, augmented by a new addendum between Monsanto and Washington Group dated November 29, 2000. (R. Vol. 2, pp. 139, 174-75.) The addendum provided that Washington Group may build a facility at the Quarry for processing silica tailings. (R. Vol. 2, pp. 174.) In return, Washington Group would pay Monsanto a royalty

of $13.00 per ton of silica tailings provided by Monsanto and sold by Washington Group. (*Id.*) The addendum noted that Washington Group "anticipates entering into one or more contracts with [SIO]" related to processing silica tailings at the Quarry, and it listed certain terms any such contracts must have for Monsanto's protection (R. Vol. 2, pp. 175)—protections for which Monsanto could have contracted with SIO directly, had there been any contract between SIO and Monsanto.

The second contractual tier comprised a Master Agreement dated December 1, 2000, between Washington Group and SIO. (R. Vol. 3, pp. 318-27.) Under the Master Agreement, SIO would pay Washington Group to construct a facility at the Quarry for processing silica tailings. (R. Vol. 3, p. 318.) Washington Group would provide silica tailings to SIO, in return for SIO's payment to Washington Group of a per-ton fee set based on the royalty Washington Group in turn was required to pay Monsanto. (R. Vol. 3, p. 319.) In addition, while Washington Group would "dry, screen and bag the silica sand" (and otherwise operate the facility) for SIO in return for payment on a time-and-materials basis, SIO itself would "provide all necessary plant equipment to dry, screen and bag the silica sand." (*Id.*) Of crucial importance, the Master Agreement provided that it "shall remain in full force and effect for a period of five years, unless otherwise agreed in writing by the parties." (R. Vol. 3, p. 321.) In other words, SIO contracted for the right to conduct business at the Quarry not a day longer than through December 1, 2005.

With that two-tiered contractual structure in place, SIO began doing business at the Quarry, starting with facilities construction in 2001 and actual processing of silica tailings beginning in early 2002. (R. Vol. 4, p. 650, Vol. 5 at 721.)

Not long after SIO began doing business at the Quarry, the first-tier contract was replaced, without change to the second-tier contract. Specifically, the Quartzite Agreement and the addendum were replaced by a second Quartzite Agreement (dated September 24, 2001) and a second addendum (dated March 1, 2002), whose terms closely followed the original versions. (R. Vol. 2, pp. 177-96.) One change, however, was that a wholly owned Monsanto subsidiary, P4 Production, LLC ("P4"), replaced Monsanto as Washington Group's contractual counterpart because P4 owned the Quarry. (R. Vol. 2, pp. 137-38, Vol. 4, p. 589.) The royalty structure also was modified. (R. Vol. 2, p. 196.) Finally, the arrangement's term, which had been set to expire at the end of 2002, was extended through the end of 2007. (R. Vol. 2, p. 180.)

As 2007 drew to a close, Washington Group notified SIO that it would terminate the Master Agreement as of January 1, 2008, and SIO must leave the Quarry. (R. Vol. 2, p. 218.) The Master Agreement had expired on December 1, 2005. (R. Vol. 3, p. 321.) But Washington Group and SIO had agreed to new pricing terms for the years 2006 and 2007, effectively extending the Master Agreement on a year-to-year basis during those years, albeit without renewing it for any longer term. (R. Vol. 2, p. 218.)

SIO demanded that Monsanto reverse Washington Group's directive to vacate the Quarry. (R. Vol. 5, pp. 721-23.) In fact, SIO contended it had an oral contract with Monsanto, "reached before Washington Group came into the picture," under which Monsanto was obligated to allow SIO to remain at the Quarry. (R. Vol. 5, p. 722.) The alleged oral contract dated back to May 2000. (R. Vol. 1, p. 3.) It supposedly required Monsanto to furnish SIO with silica tailings in quantities to be separately agreed, and to allow SIO to process them at the Quarry, in return for SIO's payment of royalties at rates to be separately agreed. (R. Vol. 3, p. 438.) This

supposed arrangement would last indefinitely: for so long as SIO's operations at the Quarry were "mutually beneficial" to SIO and Monsanto. (*Id.*) According to SIO, its operations at the Quarry would be deemed "mutually beneficial" if it followed Monsanto's environmental rules, paid Monsanto royalties as separately agreed, and sold processed silica tailings only in markets approved by Monsanto. (R. Vol. 3, pp. 438-39.)

In early 2008, after being told to leave the Quarry, SIO was able to extract a modicum of support for its indefinite-oral-contract theory in e-mails from former Monsanto engineer Mitchell Hart. (R. Vol. 2, pp. 244-46.) But in December 2000, only seven months after the alleged May 2000 oral contract was made, SIO had told Hart in writing that it was "pleased" Monsanto's "intent seems to be a long-term relationship," without asserting that Monsanto already had bound itself to a contract of indefinite duration. (R. Vol. 3, p. 449.)

In any event, Monsanto was not cowed by SIO's claim that some vague oral contract undermined the two-tiered contractual structure to which the parties had committed themselves in writing. Monsanto notified SIO that its normal business operations at the Quarry must cease by April 29, 2008, after which point it had until June 30, 2008, to remove its processing facility and equipment from the Quarry. (R. Vol. 2, p. 231.) SIO ceased operations and eventually removed its processing facility and equipment from the Quarry, although not by the June 30, 2008 deadline imposed by Monsanto. (R. Vol. 2, p. 141, Vol. 4, p. 609.) Silica tailings have not been processed at the Quarry ever since. (R. Vol. 2, p. 141, 167.)

It is little wonder that the days of processing silica tailings at the Quarry are over. According to tax its returns, SIO lost money every year:

Year	*Ordinary business income (loss)*
2001	($107,477)
2002	($127,130)
2003	($124,607)
2004	($110,136)
2005	($97,598)
2006	($108,561)
2007	($132,525)
2008	($120,237)

(R. Vol. 3, pp. 296-301, 339-40.)

II.

ADDITIONAL ISSUES PRESENTED ON APPEAL

1. Can the district court's grant of summary judgment to Washington Group on SIO's claim for breach of the implied covenant of good faith and fair dealing be affirmed on the alternative ground that, as a matter of law, Washington Group had no implied duty under the Master Agreement to furnish one of its own screens to SIO?

2. Can the district court's grant of summary judgment to Washington Group on SIO's claim for tortious interference be affirmed on the alternative ground that, as a matter of law, the alleged SIO/Monsanto contract is not actually a contract?

3. Can the district court's grant of summary judgment to Washington Group on SIO's claim for tortious interference be partially affirmed on the alternative ground that, as a matter of law, mere hindrance of SIO's performance not causing it to breach the alleged SIO/Monsanto contract is not actionable?

4. Does section 16 of the Master Agreement entitle Washington Group to recover attorney fees on appeal?

5. Does Idaho Code § 12-120(3) entitle Washington Group to recover attorney fees on appeal?

III.

ARGUMENT

A. Standard Of Review.

This Court's standard of review is the same as the standard the district court was required to apply in deciding Washington Group's motion for summary judgment. *See, e.g., Chandler v. Hayden*, 147 Idaho 765, 768, 215 P.3d 485, 488 (2009). Under that standard, the moving party bears the burden of proving—in the first instance—that no genuine issue of material fact exists. *Id.* at 769, 215 P.3d at 489. Once that burden is met, the burden shifts to the non-moving party to show that a genuine issue of material fact exists after all. *Id.* To satisfy that ultimate burden, the non-moving party "may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." *Id.* (quoting I.R.C.P. 56(e)). This requires more than "a mere scintilla of evidence" that creates only "slight doubt as to the facts." *Van v. Portneuf Med. Ctr.*, 147 Idaho 552, 556, 212 P.3d 982, 986 (2009).

B. The District Court Correctly Entered Summary Judgment Against SIO's Claim That Washington Group Breached The Master Agreement's Implied Covenant Of Good Faith And Fair Dealing.

SIO claimed that Washington Group breached the covenant of good faith and fair dealing implied by law into the Master Agreement. (R. Vol. 1, p. 16.) The district court granted summary judgment to Washington Group on that claim, holding that SIO failed to offer any evidence of recoverable damages. (R. Vol. 5, pp. 795-97.)

On appeal, SIO contends the district court overlooked one solitary item of damages evidence: Washington Group charged SIO "between $125,000 and $150,000" to fabricate a new screen for SIO, when Washington Group could have inexpensively modified one of its existing screens to meet SIO's needs. (Appellant's Opening Br. at 33.) The implied-covenant claim initially was broader than whether Washington Group was required to provide one of its own screens to SIO (R. Vol. 1, p. 16), but it is now reduced to that screen issue, as SIO does not challenge in any other way the district court's complete grant of summary judgment against the implied-covenant claim. (Appellant's Opening Br. at 32-34.) The appellant's failure to address an issue in its opening brief "eliminates consideration of it on appeal." *Rowley v. Fuhrman*, 133 Idaho 105, 108, 982 P.2d 940, 943 (1999). Thus, insofar as the implied-covenant claim is concerned, this brief will be confined to the screen issue.

1. SIO failed to direct the district court to any damages evidence.

In moving for summary judgment against the implied-covenant claim, Washington Group pointed to an overall failure of damages evidence. (R. Vol. 2, pp. 257-59.) SIO's opposition memorandum (R. Vol. 3, pp. 390-408) did not even mention the notion that Washington Group was obligated to modify one of its own screens and furnish it to SIO. The screen Washington Group fabricated for SIO was mentioned, but only to assert that Washington Group "built the screen, but it did so in such a slow and inefficient manner that SIO sustained damage as a result." (R. Vol. 3, p. 404.) To provide evidence supporting that assertion, SIO cited one of its own interrogatory responses (*id.*), which it had placed in the record deep within the voluminous affidavit of its counsel, Daniel K. Brough. (R. Vols. 4-5, pp. 468-723.) In that interrogatory response, SIO asserted that Washington Group had charged SIO "between $125,000 and

$150,000" for fabricating a new screen instead of simply "modif[ying] an existing screen, . . . which would have cost only a few hundred dollars." (R. Vol. 5, p. 705.) SIO simply failed to alert the district court to that evidence. Again, nowhere in its opposition memorandum did SIO even mention the notion that Washington Group had charged SIO for fabricating a new screen instead of modifying an existing screen at a much lower cost. SIO also failed to present that damages theory during the summary-judgment hearing.[2]

In granting summary judgment against the implied-covenant claim, the district court noted that SIO's opposition memorandum referenced its discovery responses as the source of its damages evidence. (R. Vol. 5, p. 797.) The district court then correctly pronounced the supposed evidence contained in those discovery responses, as SIO had explained that evidence in its opposition memorandum (R. Vol. 3, p. 404-05), to be "only conclusory in nature" and therefore insufficient to demonstrate a genuine issue of material fact. (R. Vol. 5, p. 797.) SIO cannot fairly blame the district court for that outcome. By filing an opposition memorandum in which it did not even mention the damages evidence to which it now directs this Court, SIO waived the right to claim the district court erred by failing to consider that evidence.

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2 During the summary-judgment hearing, SIO presented a damages theory that is decidedly different from the one it advances on appeal. There, SIO argued it did not need a screen at all, but received the totally unnecessary screen in an improper forced sale, so the screen's entire cost was recoverable as damages. (Tr. Vol. 1, pp. 69-70.) The district court did not mention that theory in its decision, but was right not to accept it, as it had no evidentiary support. In fact, SIO's own interrogatory responses confirmed it needed a screen: "in approximately the spring of 2004, SIO needed another screen to continue with its operations." (R. Vol. 4, p. 704.) In any event, the theory SIO advances on appeal—that it needed a screen, but Washington Group should have modified an existing screen at a low cost to SIO instead of fabricating a new one at a higher cost to SIO (Appellant's Opening Br. at 33)—was never argued to the district court at any time.

In other words, SIO failed to meet its burden, as the non-moving party, to "set forth specific facts showing that there is a genuine issue for trial." I.R.C.P. 56(e). It was not enough for SIO to bury its damages evidence somewhere within the 256-page Brough affidavit, without pointing the district court to it and explaining its significance. SIO's approach was no different than not offering the evidence at all. "[T]he district court was not required to search the record looking for evidence to create a genuine issue of material fact. . . . '[T]he party opposing the summary judgment [was] required to bring that evidence to the court's attention.'" *Vreeken v. Lockwood, Eng'g, B.V.*, 148 Idaho 89, 103–04, 218 P.3d 1150, 1164–65 (2009) (quoting *Esser Elec. v. Lost River Ballistics Techs., Inc.*, 145 Idaho 912, 919, 188 P.3d 854, 861 (2008)).

SIO simply failed to put the district court on notice of the damages evidence on which it now relies, and of the argument against summary judgment that it now makes. This Court should not save SIO from the natural consequence of that failure.

2. Summary judgment is proper on the alternative ground that, as a matter of law, Washington Group had no implied contractual duty to furnish one of its own screens to SIO.

The absence of damages evidence was not the only ground upon which Washington Group sought summary judgment against SIO's implied-covenant claim. Washington Group also argued that, as a matter of law, it had no implied contractual duty to furnish one of its own screens to SIO, given that the Master Agreement expressly required SIO to obtain any screening equipment needed to do business at the Quarry. (R. Vol. 2, pp. 260-61, Vol. 5, pp. 746-48.) The district court held, without meaningful explanation, that summary judgment could not be granted on that basis. (R. Vol. 5, p. 795.) On that point, the district court was wrong. If this Court is not persuaded that the district court's reason for granting summary judgment was correct, it

nevertheless may affirm the district court's grant of summary judgment on the alternative ground that Washington Group had no implied contractual duty to furnish one of its own screens to SIO. *See, e.g., Commercial Ventures, Inc. v. Rex M. & Lynn Lea Family Trust*, 145 Idaho 208, 218, 177 P.3d 955, 965 (2008) ("[W]e can affirm the district court's order granting summary judgment on alternate grounds.").

"The implied covenant of good faith and fair dealing obligates parties to cooperate with one another and to perform the obligations imposed by their agreements." *Huyett v. Idaho State Univ.*, 140 Idaho 904, 910, 104 P.3d 946, 952 (2004). It does not impose obligations that are contrary to or inconsistent with a contract's express terms. *E.g., Idaho First Nat'l Bank v. Bliss Valley Foods, Inc.*, 121 Idaho 266, 288, 824 P.2d 841, 863 (1991). Put differently, "[e]xpress terms of a contract may not be overridden by those implied from the covenant of good faith and fair dealing." *Huyett*, 140 Idaho at 910, 104 P.3d at 952.

Under section 3 of the Master Agreement, SIO "agree[d] to provide all necessary plant equipment to dry, screen, and bag the silica sand." (R. Vol. 3, p. 319.) Despite undertaking that express obligation, SIO claims Washington Group had an implied obligation to modify one of its own screens for SIO, saving SIO the expense of procuring a new screen. (R. Vol. 3, pp. 313-14.) Implying such an obligation into the Master Agreement would be an error of law, for it would have the effect of overriding SIO's express contractual obligation to provide its own screening equipment. SIO's implied-covenant claim is therefore legally untenable.

In sum, the district court's grant of summary judgment may be affirmed, on either the ground the district court granted summary judgment or this alternative ground.

C. The District Court Correctly Entered Summary Judgment Against SIO's Interference Claim, Notwithstanding Its Procedural Error.

SIO claimed that Washington Group tortiously interfered with the alleged SIO/Monsanto contract in two ways: (1) by making it needlessly difficult for SIO itself to perform; and (2) by persuading Monsanto to breach. (R. Vol. 1, pp. 17-18.) In seeking summary judgment against that claim, Washington Group's primary argument was that SIO could not prove an interference claim because the alleged SIO/Monsanto contract was not actually a contract. (R. Vol. 2, p. 259, Vol. 5, pp. 743-44.) Washington Group also argued that partial summary judgment was appropriate to the extent the claimed interference was hindering SIO's performance without causing SIO to breach. (R. Vol. 2, pp. 259-60, Vol. 5, pp. 744-46.) The district court granted summary judgment to Washington Group, but did so without discussing either of those proffered grounds for summary judgment. (R. Vol. 5, pp. 793-94.)

Instead, the district court granted summary judgment *sua sponte* on another ground: the record contained no evidence that Washington Group knew of the alleged SIO/Monsanto contract. (R. Vol. 5, pp. 793-94.) Washington Group's knowledge of the alleged SIO/Monsanto contract is, of course, an element of SIO's interference claim. *See, e.g., Wesco Autobody Supply, Inc. v. Ernest*, 149 Idaho 881, 895, 243 P.3d 1069, 1083 (2010). SIO contends on appeal, however, that the district court was not empowered to grant summary judgment *sua sponte* based on a failure of evidence on that element, as SIO had not been put on notice that it was at issue on summary judgment. (Appellant's Opening Br. at 27-30.) In other words, SIO argues the district court made a procedural error. Washington Group will concede that point.

Nevertheless, for two reasons, this Court can and should affirm in full the district court's grant of summary judgment. First, the procedural error was harmless. The reason it was harmless is that SIO is incapable of offering evidence that Washington Group knew of the alleged SIO/Monsanto contract. Second, summary judgment is proper on the primary ground Washington Group sought it: that the alleged SIO/Monsanto contract was not actually a contract. Finally, even if this Court concludes that it cannot affirm in full on those grounds, it can affirm in part, as SIO's interference claim is invalid to the extent it alleges mere hindrance of SIO's performance not resulting in a breach.

1. SIO is incapable of offering evidence that Washington Group knew of the alleged SIO/Monsanto contract.

The Idaho Rules of Civil Procedure distinguish judicial errors that are harmless from those that are not: "no error or defect in any ruling or order or in anything done or omitted by the court . . . is ground for . . . vacating modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice." I.R.C.P. 61. Consequently, "[t]his Court will not reverse the trial court if an alleged error is harmless." *Myers v. Workmen's Auto Ins. Co.*, 140 Idaho 495, 504, 95 P.3d 977, 986 (2004). The district court may have erred by granting Washington Group summary judgment on a theory it had not raised, but the error was harmless because SIO has shown that it is incapable of offering the kind of proof the district court found to be lacking.

A plaintiff in SIO's position—having suffered a *sua sponte* grant of summary judgment on grounds that the record contained no evidence to support an element of its claim—might move for reconsideration. In connection with such a motion, the plaintiff might (1) identify any

relevant evidence the district court overlooked, (2) offer additional relevant evidence, and/or (3) ask for more time to discover relevant evidence. SIO did not, however, seek reconsideration. Instead, it filed a notice of appeal. On appeal, it contends the district court overlooked relevant evidence already in the record (Appellant's Opening Br. at 31-32), without saying it could offer more evidence on remand if given the chance, or wants another try at discovering more evidence. That choice is puzzling, given that, as shown in the next few paragraphs, the record does not substantiate Washington Group's supposed knowledge of the alleged SIO/Monsanto contract. To the contrary, John Rosenbaum—the only Washington Group witness deposed, and the person in charge of its operations at the quarry (R. Vol. 4, p. 643)—unequivocally testified that he did not know of any agreement between SIO and Monsanto. (R. Vol. 4, p. 650.) In any event, by adopting that posture, SIO makes clear that it is content to stand pat and hope this Court will disagree with the district court as to whether the record contains evidence that Washington Group knew of the alleged SIO/Monsanto contract.

SIO contends Washington Group's knowledge of the alleged SIO/Monsanto contract is evidenced by the March 1, 2002 addendum (R. Vol. 2, pp. 194-96) to the second Quartzite Agreement (R. Vol. 2, pp. 177-93)—the one Washington Group and Monsanto subsidiary P4 signed after SIO's work at the Quarry had begun. (Appellant's Opening Br. at 31.) SIO seems to think the addendum demonstrates that knowledge simply because its subject matter is SIO's presence at the Quarry. That conclusion does not follow. The addendum simply shows that Washington Group and P4 agreed between themselves on terms governing SIO's presence at the Quarry, just as Washington Group and Monsanto had done in their November 29, 2000 addendum to the first Quartzite Agreement. (R. Vol. 2, pp. 174-75.) The two nearly identical

addenda each contemplated Washington Group's "entering into one or more contracts with [SIO]" relating to processing sand at the Quarry. (R. Vol. 2, pp. 175, 195.) Tellingly, both listed certain terms that "[a]ny such contracts" must have for Monsanto's or P4's protection. (*Id.*) Had Monsanto contracted with SIO, it could have obtained whatever protections it needed directly from SIO, without having to require Washington Group to obtain them indirectly. Consequently, the addendum is inconsistent with the notion that Washington Group knew SIO had a contract with Monsanto entitling it to conduct business at the Quarry indefinitely.

The addenda to the two Quartzite Agreements evidence the mutual intent of Monsanto/P4 and Washington Group to establish a two-tiered contractual structure: Monsanto/P4 with Washington Group, and Washington Group with SIO. SIO cannot explain why such a structure should have let Washington Group know about the alleged SIO/Monsanto contract. As the district court observed, "[c]ertainly there is no legal requirement that there be an independent contract between Monsanto and SIO to facilitate this arrangement" and, consequently, there is no reason for Washington Group to presume that one existed. (R. Vol. 5, p. 794.)

The other items of evidence to which SIO points (Appellant's Opening Br. at 31) also fail to evidence Washington Group's knowledge of the alleged SIO/Monsanto contract. Each is merely evidence that at times SIO, Washington Group, and Monsanto would discuss a royalty structure and incorporate it into both the Monsanto/Washington Group agreement and the Washington Group/SIO agreement. (R. Vol. 3, pp. 464-66, Vol. 4, pp. 649, 656.) While SIO relies on testimony of Washington Group's John Rosenbaum that such royalty discussions occurred, SIO fails to note that Rosenbaum unequivocally testified that he did not know of any agreement between SIO and Monsanto. (R. Vol. 4, p. 650.)

The district court was right: the record contained no evidence that Washington Group knew of the alleged SIO/Monsanto contract. Indeed, SIO's Todd Sullivan wrote in an April 2008 e-mail (R. Vol. 5, pp. 721-23) that the alleged SIO/Monsanto contract dates back to a time "before Washington Group came into the picture." (R. Vol. 5, p. 722.) SIO has no explanation for how Washington Group could have known about an alleged oral contract, made before it came into the picture, entitling SIO to conduct business at the Quarry indefinitely.

So, while it may have been procedural error for the district court to grant summary judgment on a ground not raised by Washington Group, the error was harmless, as SIO cannot prove Washington Group knew of the alleged SIO/Monsanto contract. From a "harmless error" standpoint, this case is like *Taylor v. AIA Services Corp.*, 151 Idaho 552, 261 P.3d 829 (2011). There, Taylor filed a motion under I.R.C.P. 56(f) for more time to respond to the defendants' motion for partial summary judgment. The district court denied Taylor's motion and granted partial summary judgment to the defendants, and Taylor appealed. This Court affirmed, holding both that the district court did not abuse its discretion in denying Taylor's motion and that, in any event, any error was harmless under I.R.C.P. 61 because "Taylor fails to point to any information that might have been discovered that could change the outcome of the partial summary judgment, so he has not demonstrated that he suffered any prejudice." *Id.* at 572-73, 261 P.3d at 849-50. Like Taylor, SIO provides no reason to believe it could overcome the evidentiary shortfall if given the opportunity. If the district court's grant of summary judgment were reversed, on remand SIO could not avoid summary judgment on the same ground the district court has already granted it. This Court need not reverse and remand because of a procedural error when the same substantive result is assured on remand.

2. Summary judgment is proper on the alternative ground that, as a matter of law, the alleged SIO/Monsanto contract is not actually a contract.

The existence of a contract is, of course, an element of SIO's interference claim. *See, e.g., Wesco Autobody*, 149 Idaho at 895, 243 P.3d at 1083. As noted above, Washington Group sought summary judgment against SIO's interference claim on the ground that the alleged SIO/Monsanto contract, with which Washington Group supposedly interfered, is too indefinite and uncertain to actually be a contract. (R. Vol. 2, p. 259, Vol. 5, pp. 743-44.) To make that argument, Washington Group incorporated by reference Monsanto's arguments to that effect, which Monsanto made in seeking summary judgment against SIO's claim that Monsanto breached the alleged SIO/Monsanto contract. (R. Vol. 1, 90-94, Vol. 5, pp. 730-31.) The district court did not decide whether the alleged SIO/Monsanto contract is actually a contract because it disposed of SIO's breach claim by deeming the alleged SIO/Monsanto contract unenforceable under the UCC statute of frauds. (R. Vol. 5, p. 786.) While the district court made an offhand observation that it may well have allowed the contract-or-not-a-contract issue to reach the jury had reaching that issue on summary judgment been necessary (*id.*), a careful analysis reveals that SIO cannot possibly prove the alleged SIO/Monsanto contract is actually a contract. Even assuming *arguendo* that SIO and Monsanto orally agreed to terms just as SIO says, the resulting accord would not actually be a contract because of its indefiniteness on two crucial terms: price and quantity.

The price term of the alleged SIO/Monsanto contract is that "SIO would pay Monsanto royalties in agreed-upon amounts" for silica tailings furnished by Monsanto. (R. Vol. 3, p. 438.)

In other words, SIO admits the royalty rates were left open for future agreement. Consequently, the alleged oral SIO/Monsanto contract is not really a contract at all:

> To be enforceable, a contract must provide a price or a means of determining the price. If the parties provide a practicable, objective method of determining the price of compensation, not leaving it to the future will of the parties themselves, there is no such indefiniteness or uncertainty as will prevent the agreement from being an enforceable contract. At the very least, the parties must specify in the agreement a practicable method by which the price can be determined by the court without any new expression by the parties themselves.

Bauchman-Kingston P'ship, LP v. Haroldsen, 149 Idaho 87, 93, 233 P.3d 18, 24 (2008) (citations, quotation marks, and brackets omitted); *see also Traylor v. Henkels & McCoy, Inc.*, 99 Idaho 560, 562, 585 P.2d 970, 972 (1978) ("In the absence of an agreement between the parties regarding the amount to be paid to Traylor, there was failure to agree on an essential term of the contract. Such an agreement is too indefinite to enforce."). The alleged SIO/Monsanto contract specifies neither a price nor a practical, objective method of determining a price. Instead, it impermissibly leaves the price to be determined by the parties' future will. SIO argued below that setting the price through its December 1, 2000 Master Agreement with Washington Group was good enough (R. Vol. 3, p. 381), but the Master Agreement did not even exist in May 2000, when the alleged SIO/Monsanto contract was made. (R. Vol. 1, p. 3.) Accordingly, the Master Agreement does not help SIO avoid the conclusion that the alleged SIO/Monsanto agreement left price to the parties' future will and therefore is not an actual contract.

Also left open for future agreement was the quantity term: "Monsanto would furnish SIO with certain agreed-upon quantities of sand . . . ." (R. Vol. 3, p. 438.) An agreement with an open quantity term is too indefinite to be enforced as a contract. *Dale's Serv. Co. v. Jones*, 96

Idaho 662, 665, 534 P.2d 1102, 1105 (1975) ("This clause does not establish with sufficient definiteness and clarity the quantity of fill that T & J were expected to provide. A party will not be subjected to a contractual obligation, where the character of that obligation is so indefinite and uncertain as to its terms and requirements that it is impossible to state with reasonable certainty the obligation involved.").

That said, failure to specify quantity is not always an agreement's death knell. The UCC enforces requirements contracts, which "measure[ ] the quantity by . . . the requirements of the buyer." Idaho Code § 28-2-306(1). A requirements contract "is not too indefinite since it is held to mean the actual good faith . . . requirements of the [buyer]." Idaho Code § 28-2-306 cmt. 2. Even SIO, however, does not contend the alleged SIO/Monsanto contract is a requirements contract. Instead, SIO merely argued to the district court that the alleged SIO/Monsanto contract "is not so very different from a simple, and common, requirements contract." (R. Vol. 3, p. 381.) The difference, however, is legally crucial. SIO did not agree to buy its requirements for silica tailings from Monsanto. Even under its version of the facts, all it agreed to do was buy silica tailings from Monsanto in quantities to be agreed in the future. That promise is illusory because an obligation "to buy all that the buyer wishes or may thereafter choose to order" leaves the quantity to be bought "exclusively to the will of the [buyer]." 2 Joseph M. Perillo & Helen Hadjiyannakis Bender, *Corbin on Contracts* § 6.5 (rev. ed. 1993). By contrast, with a true requirements contract, the buyer's promise is not illusory because the buyer is obligated to buy from the seller in accordance with the buyer's "objective need for the commodity." *Id.*

SIO's obligations under the alleged SIO/Monsanto contract are so indefinite and illusory that it is not actually a contract. For that reason, an interference claim predicated on it fails as a

matter of law. Consequently, even if this Court concludes that Washington Group was not entitled summary judgment on the grounds employed by the district court, the district court's award of summary judgment nevertheless can be affirmed on alternative grounds.

3. Partial summary judgment is proper on the alternative ground that, as a matter of law, the alleged interference with SIO's performance is not actionable because it did not cause SIO to breach.

If this Court concludes that it cannot affirm in full on either of the two grounds discussed above, it nevertheless can affirm in part. SIO claimed that Washington Group committed two distinct types of interference with the alleged SIO/Monsanto contract: (1) making it needlessly difficult for SIO itself to perform; and (2) persuading Monsanto to breach. (R. Vol. 1, p. 17.) But interference with a contract is actionable only if it results in a breach. *E.g., Bybee v. Isaac*, 145 Idaho 251, 259, 178 P.3d 616, 624 (2008) (holding that an element of a claim for tortious interference with a contract is "intentional interference causing a breach of the contract"). The first type of interference therefore is not actionable. SIO claimed only that its performance was made needlessly difficult, not that it breached. (R. Vol. 1, p. 17.) In fact, SIO affirmatively denied that it breached. (R. Vol. 3, p. 403.) Thus, Washington Group is entitled to partial summary judgment to the extent SIO alleged interference with its own contractual performance.

As noted above, Washington Group moved for partial summary judgment on that ground (R. Vol. 2, pp. 259-60), but the district court did not reach it. (R. Vol. 5, pp. 744-46, 793-94.) The opposing argument SIO made to the district court—that, despite its denial of breaching, SIO might eventually have uncovered evidence of a breach (R. Vol. 3, p. 403)—is untenable. "'Motions for summary judgment are decided upon facts shown, not upon facts that might have been shown.'" *Aardema v. U.S. Dairy Sys., Inc.*, 147 Idaho 785, 793, 215 P.3d 505, 513 (2009)

(brackets omitted) (quoting *Verbillis v. Dependable Appliance Co.*, 107 Idaho 335, 337, 689 P.2d 227, 229 (Ct. App. 1984)).

D. Excluding Mitchell Hart's March 14, 2008 E-Mail From Evidence Was Correct Or, At Worst, Harmless Error.

In opposing the motions for summary judgment filed by Monsanto and Washington Group, SIO filed an affidavit by Todd Sullivan, one of its principals. (R. Vol. 3, pp. 437-67.) The exhibits to Sullivan's affidavit included three e-mails that Sullivan received from Mitchell Hart on January 17, March 6, and March 14 of 2008, respectively. (R. Vol. 3, pp. 445-48.) Hart had been a mining engineer for Monsanto in 2000, when SIO says its alleged contract with Monsanto was formed, but he left Monsanto in 2005. (R. Vol. 2, pp. 240-41.) His three e-mails were sent in response to Sullivan's attempts to get him to admit—three years after leaving Monsanto, and eight years after the fact—that SIO and Monsanto had entered into an oral contract. (R. Vol. 3, p. 439.)

Monsanto moved to strike all three of Hart's e-mails as hearsay. (R. Vol. 5, pp. 752-59.) The district court agreed with Monsanto that the e-mails are hearsay. (R. Vol. 5, p. 782.) The district court also agreed with Monsanto that the e-mails do not satisfy the residual exception to the hearsay rule, I.R.E. 803(24), as SIO had argued. (R. Vol. 5, p. 783.) Nevertheless, the district court declined to strike the January 17 and March 6 e-mails, as they had been placed into the record not only by SIO, but also by Monsanto itself, in an affidavit in which Hart explained why he sent them and why he now believed some of their content was incorrect. (R. Vol. 2, pp. 239-46, Vol. 5, pp. 783, 786.) Consequently, only the March 14 e-mail was stricken as inadmissible hearsay. (R. Vol. 5, pp. 786.)

SIO contends on appeal that the March 14 e-mail was hearsay, but fits within the residual exception, and therefore should not have been stricken. (Appellant's Opening Br. at 34-36.) For two reasons, however, the district court's evidentiary ruling should be affirmed.

First, at least one of the residual exception's conditions is not met. Under the residual exception, a court can admit a hearsay statement into evidence if it meets several conditions, one of which is that it be "more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts." I.R.E. 803(24). Hart's March 14 e-mail does not meet that condition because it is essentially a reaffirmation and summary of his January 17 and March 6 e-mails, which the district court considered. (R. Vol. 5, pp. 783, 786.) While SIO suggests the March 14 e-mail bears on whether the alleged SIO/Monsanto contract is barred by the UCC statute of frauds (Appellant's Opening Br. at 36), it bears on that issue in the same way as the January 17 and March 6 e-mails. The March 14 e-mail is not "more probative" on that issue than those e-mails are. In fact, both the March 14 e-mail and the March 6 e-mail speak to the sale-of-goods nature of the alleged SIO/Monsanto contract by saying that SIO was to pay Monsanto a royalty in return for being "assure[d] certain volumes of sand." (R. Vol. 3, pp. 446-48.) Furthermore, as the district court held, the March 14 e-mail is not more probative than sworn testimony from Hart (R. Vol. 5, p. 783), which SIO had obtained and placed into the record. (R. Vol. 4, pp. 501-26.) Thus, the district court was correct in holding that the March 14 e-mail is hearsay that does not satisfy the residual exception.

Second, even if the district court's holding were erroneous, it would merely be a classic example of harmless error. As just discussed, the March 14 e-mail's content is not materially different from that of the January 17 and March 6 e-mails. Further, it is not materially different

from Sullivan's own affidavit testimony about the terms of the alleged SIO/Monsanto contract. (R. Vol. 3, pp. 438-39.) Since the district court considered the January 17 and March 6 e-mails (R. Vol. 5, pp. 783, 786), as well as Sullivan's affidavit testimony, no prejudice could have arisen from excluding the March 14 e-mail. Excluding the March 14 e-mail was harmless because the outcome on summary judgment would have been the same either way. *See, e.g.*, I.R.C.P. 61 ("No error in . . . the exclusion of evidence . . . is ground for . . . vacating modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice."); *Taylor*, 151 Idaho at 572-73, 261 P.3d at 849-50 (holding that denying a I.R.C.P. 56(f) motion, if error, was no worse than harmless error under I.R.C.P. 61 because the plaintiff "fail[ed] to point to any information that might have been discovered that could change the outcome of the partial summary judgment"). SIO certainly does not show otherwise.

E. Washington Group Is Entitled To Recover Attorney Fees On Appeal.

If this Court affirms the district court's grant of summary judgment to Washington Group, then on two independent grounds Washington Group is entitled to recover attorney fees on appeal. The first is Idaho Code § 12-120(3)—the district court's basis for awarding attorney fees. (Addendum A, pp. 5-7, *infra*.) The second is section 16 of the Master Agreement.

1. Idaho Code § 12-120(3) entitles Washington Group to attorney fees.

The prevailing party in any civil action based on a "commercial transaction" is entitled to recover its reasonable attorney fees. Idaho Code § 12-120(3). Of course, section 12-120(3) "applies on appeal as well as at trial." *Lunders v. Estate of Snyder*, 131 Idaho 689, 700, 963 P.2d 372, 383 (1998). It defines "[t]he term 'commercial transaction' . . . to mean all transactions

except transactions for personal or household purposes," Idaho Code § 12-120(3), and it applies if the commercial transaction is "integral to the claim, and constitutes the basis upon which the party is attempting to recover." *Blimka v. My Web Wholesaler, LLC*, 143 Idaho 723, 728, 152 P.3d 594, 599 (2007). So long as that requirement is met, it does not matter whether relief is sought on contract theories, tort theories, or both. *Id.* at 728-29, 152 P.3d at 599-600. In fact, "as long as a commercial transaction is at the center of the lawsuit, the prevailing party may be entitled to attorney fees for claims that are fundamentally related to the commercial transaction yet sound in tort." *Carrillo v. Boise Tire Co.*, 12.10 ISCR 1, 17 (Apr. 13, 2012).

The Master Agreement is a "commercial transaction" as defined by section 12-120(3), and it plainly is integral to, and the basis for, SIO's implied-covenant claim. Washington Group therefore is entitled to attorney fees under section 12-120(3) with respect to that claim.

Further, with respect to SIO's interference claim, SIO's own theory of the case is that the Master Agreement was signed so that Washington Group could administer the alleged SIO/Monsanto contract on Monsanto's behalf. (R. Vol. 1, p. 4.) Thus, SIO portrayed the alleged SIO/Monsanto contract and the Master Agreement as inextricably intertwined business arrangements. For that reason, the Master Agreement not only was "at the center of the lawsuit" between SIO and Washington Group, but also is "fundamentally related" to the interference claim. *Carrillo*, 12.10 ISCR at 17. Accordingly, section 12-120(3) applies to the inference claim, just as it applies to the implied-covenant claim.

Upon affirming the district court's grant of summary judgment, this Court should award Washington Group attorney fees on appeal under section 12-120(3), just as the district court awarded them below.[3] (Addendum A, pp. 5-7, *infra.*)

2. The Master Agreement entitles Washington Group to attorney fees.

The Master Agreement furnishes an alternative basis for awarding Washington Group attorney fees. Its section 16 provides as follows:

> Any suit, dispute, litigation, action, claim and/or proceedings in connection herewith, the subject matter hereof or between the parties hereto, will be brought, prosecuted and resolved solely and exclusively in the courts of the State of Idaho or the United States District Court of Idaho. Each party consents to the personal jurisdiction of the State of Idaho of all actions, disputes, litigation, claims, suits, and/or proceedings arising out of this Agreement or the subject matter hereof, whether based on tort, contract, warranty, misrepresentation, fraud, or otherwise. The prevailing party shall be entitled to reasonable attorney fees.

(R. Vol. 3, p. 323 (emphasis added).) This is an unusually broad fee provision. It plainly applies to SIO's claim for breach of the implied covenant of good faith and fair dealing, which arises directly under the Master Agreement. It also applies to SIO's claim for tortious interference with the alleged SIO/Monsanto contract, even though that claim arises indirectly from, instead of directly under, the Master Agreement. Examining section 16's three sentences, one by one, bears out that latter conclusion.

Section 16's first sentence is a forum-selection clause in favor of Idaho courts. It applies to any claim "in connection [with the Master Agreement], the subject matter [of the Master

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[3] SIO does not contest the district court's award of attorney fees (Addenda A-B, *infra*). It therefore accedes to the same result for which Washington Group now argues: that section 12-120(3) applies to this case. An unchallenged result below should obtain on appeal.

Agreement], or between the parties [to the Master Agreement]." (*Id.*) Thus, by its own plain language, the forum-selection clause covers more than just claims arising directly under the Master Agreement. It extends to "[a]ny . . . claim . . . between the parties" to the Master Agreement. (*Id.*) The interference claim is subject to the forum-selection clause because it is "between the parties" to the Master Agreement: SIO and Washington Group. That claim also is subject to the forum-selection clause because it is made in connection with the Master Agreement's "subject matter": SIO's business at the Monsanto Quarry. (R. Vol. 3, pp. 318-19.)

Section 16's second sentence is a consent-to-jurisdiction-in-Idaho clause that applies to any claim "arising out of this Agreement or the subject matter hereof, whether based on tort, contract, warranty, misrepresentation, fraud, or otherwise." (R. Vol. 3, p. 323.) Its scope also extends well beyond claims arising directly under the Master Agreement. It covers any claim arising out of the Master Agreement's "subject matter." As just explained, the interference claim arises from the Master Agreement's "subject matter": SIO's business at the Quarry. The interference claim therefore also is subject to the consent-to-jurisdiction-in-Idaho clause.

Section 16's third and final sentence simply states that "[t]he prevailing party shall be entitled to reasonable to attorney fees." (*Id.*) By "prevailing party," it means the party that prevailed on a claim within the scope of section 16's forum-selection clause, consent-to-jurisdiction-in-Idaho clause, or both. No other meaning is possible. Since SIO's interference claim is within the scope of the forum-selection clause and the consent-to-jurisdiction-in-Idaho clause, it necessarily also is within the scope of the "prevailing party" clause.

Consequently, section 16 authorizes awarding Washington Group attorney fees with respect to not only the implied-covenant claim, but also the interference claim. This Court can

rely on it, in addition or in the alternative to section 12-120(3), in awarding Washington Group attorney fees on appeal.

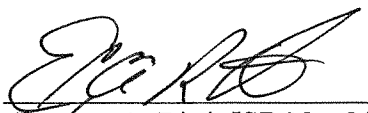
IV.

CONCLUSION

This Court should affirm the district court's grant of summary judgment to Washington Group, and it should award Washington Group attorney fees and costs on appeal.

RESPECTFULLY SUBMITTED THIS 14th day of June, 2012.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By 
Eugene A. Ritti, ISB No. 2156

Attorneys for Respondent Washington Group International, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of June, 2012, I caused to be served two true copies of the foregoing BRIEF OF RESPONDENT WASHINGTON GROUP INTERNATIONAL, INC. by the method indicated below, and addressed to each of the following:

David P. Gardner Moffatt, Thomas, Barrett, Rock & Fields, Chartered 412 W. Center Street P.O. Box 817 Pocatello, Idaho 83204-0817	X U.S. Mail, Postage Prepaid ____ Hand Delivered ____ Overnight Mail ____ E-mail ____ Telecopy
Barry N. Johnson Daniel K. Brough Bennett Tueller Johnson & Deere 3165 East Millrock Drive, Suite 500 Salt Lake City, Utah 84121	X U.S. Mail, Postage Prepaid ____ Hand Delivered ____ Overnight Mail ____ E-mail ____ Telecopy
W. Marcus W. Nye Randall C. Budge Racine Olson Nye Budge & Bailey, Chtd. 201 E. Center Street P.O. Box 1391 Pocatello, Idaho 83204-1391	X U.S. Mail, Postage Prepaid ____ Hand Delivered ____ Overnight Mail ____ E-mail ____ Telecopy

Eugene A. Ritti

ADDENDUM
A

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CARIBOU

SILICON INTERNATIONAL ORE, LLC, AN IDAHO LIMITED LIABILITY COMPANY, PLAINTIFF, VS MONSANTO COMPANY, A DELAWARE CORPORATION AND WASHINGTON GROUP INTERNATIONAL, INC., AN OHIO CORPORATION, DEFENDANTS.	Case No: CV-2009-0000366 **MEMORANDUM DECISION AND ORDER ON DEFENDANTS' MOTIONS FOR COSTS AND ATTORNEY FEES**

This matter is before the Court on Defendants', Monsanto Company (Monsanto) and Washington Group International, Inc. (WGI), respective motions for attorney fees and costs. Plaintiff, Silicon International Ore, LLC (SIO), objected to both Monsanto's and WGI's requests for attorney fees and costs, filing a memorandum in opposition to both parties' motions. This matter was argued to the Court on February 10, 2012. Following argument, the Court took this matter under advisement. The Court has considered the parties' arguments, both set forth in their respective briefing and as presented at oral argument, and now issues its Memorandum Decision and Order.

COURSE OF PROCEEDING

SIO filed its Complaint in this matter on December 31, 2009. SIO's Complaint asserted four (4) separate claims for relief against Monsanto and two (2) separate claims

for relief against WGI. Both parties moved for summary judgment against SIO and its various claims. On September 21, 2011, the Court entered its Memorandum Decision and Order on Defendants' Motions for Summary Judgment (MD&O). The Court's MD&O granted summary judgment to both Monsanto and WGI with respect to each of the claims SIO asserted against them. Judgment was entered pursuant to the MD&O on October 7, 2011. SIO has appealed from the Court's Judgment as well as its MD&O dismissing SIO's Complaint and claims for relief against Monsanto and WGI.

Both Monsanto and WGI have requested an award of costs and attorney fees pursuant to Idaho Code §§12-120(3) and 12-121, claiming to be the prevailing parties in the litigation pursuant to Rule 54(d)(1)(B) of the Idaho Rules of Civil Procedure.

DISCUSSION

Pursuant to the Court's MD&O on summary judgment and its subsequent entry of Judgment dismissing SIO's claims, both Monsanto and WGI have asserted that they are the prevailing party in this litigation pursuant to I.R.C.P. 54(d)(1)(B), and thereby are entitled to an award of costs pursuant to I.R.C.P. 54(d) and attorney fees pursuant to I.R.C.P. 54(e) and I.C. §§12-120(3) and 12-121.

A prerequisite to any award of costs and attorney fees is a determination by the Court concerning prevailing party status. *See* Idaho Code §§12-120 and 12-121; and I.R.C.P. 54(d)(1) and (2) and I.R.C.P. 54(e)(1).

1. Prevailing Party.

Monsanto and WGI both claim that they are the prevailing party in their litigation with SIO. Rule 54(e)(1) of the Idaho Rules of Civil Procedure provides that the Court must utilize the definition found in I.R.C.P. 54(d)(1)(B) in determining whether a litigant is the

prevailing party and entitled to an award of attorney fees. I.R.C.P. 54(d)(1)(B) defines prevailing party as follows:

> In determining which party to an action is a prevailing party and entitled to costs, the trial court shall in its sound discretion consider the final judgment or result of the action in relation to the relief sought by the respective parties. The trial court in its sound discretion may determine that a party to an action prevailed in part and did not prevail in part, and upon so finding may apportion the costs between and among the parties in a fair and equitable manner after considering all of the issues and claims involved in the action and the resultant judgment or judgments obtained.

In *Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.*, 141 Idaho 716, 719, 117 P.3d 130, 133 (2005) (*Eighteen Mile Ranch*), the Idaho Supreme Court held, "in litigation, avoiding liability is as good for a defendant as winning a money judgment is for a plaintiff." Therefore, the Court has little difficulty concluding that both Monsanto and WGI are the prevailing parties in their litigation with SIO, having obtained a defense verdict on all of the claims SIO brought against them respectively. Neither, Monsanto or WGI brought a counterclaim against SIO. *See also Oakes v. Boise Heart Clinic Physicians PLLC*, 2012 WL 695074, *6.[1]

2. Costs.

Rule 54(d)(1)(A) of the Idaho Rules of Civil Procedure provides that "except when otherwise limited by these rules, costs shall be allowed as a matter of right to the prevailing party or parties, unless otherwise ordered by the court."

The Court, having determined that Monsanto and WGI were the prevailing party in their litigation with SIO, will now consider Monsanto's and WGI's respective claims for costs.

[1]SIO has not contested either Monsanto's or WGI's claim of prevailing party status.

Monsanto is seeking $1,143.92 in costs as a matter of right. These costs include a $58.00 filing fee to Caribou County District Court (Monsanto's Answer) and deposition expenses for four (4) depositions: (1) James R. Smith ($424.23); (2) David Farnsworth ($384.89);[2] (3) Mitchell J. Hart and; (4) John Rosenbaum ($234.50).

Court filing fees (I.R.C.P. 54(d)(1)(C)1.) and charges for one (1) copy of depositions taken by any of the parties to the action in preparation for trial of the action (I.R.C.P. 54(d)(1)(C)10.) fall within the parameters of Rule 54(d)(1)(C) of the Idaho Rules of Civil Procedure and are properly characterized as a "cost as a matter of right." Therefore, the Court **GRANTS** Monsanto's requested costs in the total amount of **$1,143.92.**

Similarly, WGI has made a request for the same items of cost. The only difference between WGI's claimed costs and Monsanto's is WGI's claim for $125.00 for service of a subpoena upon the Southeast Idaho Council of Government. This claimed item of cost has not been objected to by SIO, and does, on its face, appear to fall within the provision of I.R.C.P. 54(d)(1)(C) subparagraph 2. This subparagraph provides for the recovery of "fees [incurred] for service of any pleading or document in the action whether served by a public officer or other person." Therefore, the Court will **GRANT** WGI's claimed costs of right in the amount of **$1,281.83.**

Neither party has made a request for "discretionary costs" pursuant to I.R.C.P. 54(d)(1)(D).[3]

---

[2]David Farnsworth and Mitchell J. Hart's deposition costs were combined into one amount.

[3]Monsanto has included its claim for attorney fees as an item of discretionary cost. SIO has devoted a section, in Plaintiff's Memorandum in Opposition to Defendant Monsanto Company's Motion for Order Awarding Attorney Fees and Costs, to Monsanto's inclusion of attorney fees as a discretionary cost item. The Court will analyze Monsanto's claim for attorney fees separately, pursuant to I.R.C.P. 54(e) and I.C§§12-120(3) and 12-121 – not I.R.C.P. 54(d)(1(D).

3. Attorney Fees.

Both Monsanto and SIO seek an award of attorney fees pursuant to I.R.C.P. 54(e)(1), 54(e)(5), and Idaho Code §12-120(3).[4] Pursuant to I.C. §12-120(3), the prevailing party in a commercial transaction is allowed "a reasonable attorney's fee to be set by the court." I.C. §12-120(3) provides as follows:

> In any civil action to recover on an open account, account stated, note, bill, negotiable instrument, guaranty, or contract relating to the purchase or sale of goods, wares, merchandise, or services and in any commercial transaction unless otherwise provided by law, the prevailing party shall be allowed a reasonable attorney's fee to be set by the court, to be taxed and collected as costs.

I.C. §12-120(3) has also defined a "commercial transaction" as being "all transactions except transactions for personal or household purposes."

A review of Idaho's appellate case law regarding the application of the "commercial transaction" language of I.C. §12-120(3) reveals that its definition and application are expansive rather than restrictive; therefore, the Court concurs with the argument presented to the Court by Monsanto and found in the Idaho Court of Appeals decision in *Ericksen v. Blue Cross of Idaho Health Servs., Inc.*, 116 Idaho 693, 695, 778 P.2d 815, 817 (Ct.App.1989). The evolution of this expansive approach to the definition of "commercial transaction" is most readily and recently established in the Idaho Supreme Court cases of *Carrillo v. Boise Tire Co., Inc.*, 2012 WL 666038 (*Carrillo*); *Garner v. Povey*, 151 Idaho 462, 259 P.3d 608, 615 (2011) (*Garner*); and *Blimka v. My Web Wholesaler*, 143 Idaho 723, 152 P.3d 594 (2007) (*Blimka*).

[4]Monsanto and WGI also assert that they are entitled to an award of attorney fees pursuant to I.C. §12-121. Because this Court concludes that the gravamen of SIO's Complaint and claims involved a claimed commercial transaction, the Court will award Monsanto and WGI their reasonable attorney fees pursuant to I.C. §12-120(3). Therefore, the Court will not engage in an analysis of I.C. §12-121 and whether Monsanto and WGI are entitled to an award of attorney fees and costs pursuant to I.C. §12-121.

The analysis a trial court must undertake in determining whether a prevailing party is entitled to an award of attorney fees under I.C. §12-120(3) was addressed by the Idaho Supreme Court in *Garner*. In *Garner*, the Idaho Supreme Court stated as follows:

> Whether a district court has correctly determined that a case is based on a commercial transaction for the purpose of I.C. § 12–120(3) is a question of law over which this Court exercises free review. *Great Plains*, 136 Idaho at 470, 36 P.3d at 222. Idaho Code § 12–120(3) allows for an award of attorney fees to the prevailing party in a civil action to recover "in any commercial transaction." A commercial transaction includes all transactions except those for personal or household purposes. I.C. § 12–120(3). In determining whether attorney fees should be awarded under I.C. § 12–120(3), the Court has conducted a two-step analysis: "(1) there must be a commercial transaction that is integral to the claim; and (2) the commercial transaction must be the basis upon which recovery is sought." *Great Plains*, 136 Idaho at 471, 36 P.3d at 223 (internal quotation marks omitted). "The commercial transaction must be an actual basis of the complaint.... [T]he lawsuit and the causes of action must be based on a commercial transaction, not simply a situation that can be characterized as a commercial transaction." *Id.* In other words, the relevant inquiry is whether the commercial transaction constituted "the gravamen of the lawsuit," and was the basis on which a party is attempting to recover. *Id.* at 472, 36 P.3d at 224.

259 P.3d at 615.

In the case at bar, there can be no doubt that this is a commercial transaction as that term has been defined by the Idaho Supreme Court in *Garner* and other Idaho appellate decisions. Both prongs of the test enunciated therein are clearly met. A commercial transaction was integral to each of SIO's claims against both Monsanto and WGI.[5] Further, the commercial transaction was the very basis upon which recovery was being sought.

[5]With respect to Monsanto, it is of no moment that the Court determined that there was no valid or binding oral contract in place between SIO and Monsanto. What triggers the application of attorney fees, as it relates to SIO and Monsanto, is SIO's claim that there was a valid and enforceable oral contract in place between it and Monsanto for goods other than for personal or household purposes. *See Farmers Nat. Bank v. Shirey*, 126 Idaho 63, 73, 878 P.2d 762 772 (1994) ("Where a party alleges the existence of a contractual relationship of a type embraced by section 12-120(3), as the Shireys have done, that claim triggers the application of the statute and a prevailing party may recover fees even though no liability under a contract was established." *Twin Falls Livestock Comm'n Co. v. Mid-Century Ins. Co.*, 117 Idaho 176, 184, 786 P.2d 567, 575 (Ct.App.1989) (*rev. denied*).)

Therefore, the Court has no difficulty concluding that a commercial transaction constituted the "gravamen" of SIO's lawsuit.[6]

Therefore, the Court concludes that both Monsanto and WGI, as prevailing parties in this litigation, are entitled to an award of reasonable attorney fees pursuant to I.C. §12-120(3).

4. Reasonableness of Attorney Fees.

Once the Court has identified a statutory or contractual entitlement to attorney fees, the Court must determine the amount of attorney fees to award. Rule 54(e)(1) charges the Court with the responsibility of awarding a "reasonable attorney fee[]" when attorney fees are provided by statute or contract. This analysis is controlled by Rule 54(e)(3) of the Idaho Rules of Civil Procedure. This Rule provides as follows:

> In the event the court grants attorney fees to a party or parties in a civil action it shall consider the following factors in determining the amount of such fees:
>
> (A) The time and labor required.
>
> (B) The novelty and difficulty of the questions.
>
> (C) The skill requisite to perform the legal service properly and the experience and ability of the attorney in the particular field of law.
>
> (D) The prevailing charges for like work.
>
> (E) Whether the fee is fixed or contingent.
>
> (F) The time limitations imposed by the client or the circumstances of the case.
>
> (G) The amount involved and the results obtained.

[6]This conclusion is equally applicable to the claims asserted by SIO against Monsanto and SIO for Breach of the Implied Covenant of Good Faith and Fair Dealing, Equitable Estoppel, Quasi Estoppel, and Tortious Interference with Contract. Each of these claims fit within the two (2) prong analysis enunciated in *Garner*.

(H) The undesirability of the case.

(I) The nature and length of the professional relationship with the client.

(J) Awards in similar cases.

(K) The reasonable cost of automated legal research (Computer Assisted Legal Research), if the court finds it was reasonably necessary in preparing a party's case.

(L) Any other factor which the court deems appropriate in the particular case.

When determining the amount of attorney fees to be awarded, the district court must, at a minimum, provide a record which establishes that the Court considered the factors found in I.R.C.P 54(e)(3). *Building Concepts, Ltd v. Pickering*, 114 Idaho 640, 645, 759 P.2d 931, 936 (Ct.App.1988). A trial court need not specifically address all of the factors contained in I.R.C.P 54(e)(3) in writing, so long as the record clearly indicates that the Court considered them all. *Brinkman v. Aid Ins. Co.*, 115 Idaho 346, 351, 766 P.2d 1227 (1988).

The Court "has discretion, after considering the factors contained in I.R.C.P. 54(e)(3), to determine the amount of attorney fees that should be awarded." *Young v. State Farm Mut. Auto Ins. Co.*, 127 Idaho 122, 128, 898 P.2d 53 (1995). In analyzing a trial court's exercise of its discretion, the appellate courts apply an abuse of discretion standard. *Schroeder v. Partin*, 151 Idaho 471, ___, 259 P.3d 617, 624 (2011). In application, this means that the appellate court will defer to the trial court's discretion if; "(1) the court correctly perceived the issue as one of discretion; (2) the court acted within the boundaries of such discretion and consistently with legal standards applicable to specific choices; and (3) the court reached its decision by an exercise of reason." *Id.*

quoting Henderson v. Henderson Investment Properties, L.L.C., 148 Idaho 638, 227 P.3d 568 (2010).

As stated by the Idaho Court of Appeals in *Action Collection Services, Inc. v. Bigham*, 146 Idaho 286, 290, 192 P.3d 1110, 1114 (Ct.App.2008), "a court need not blindly accept the figures advanced by the attorney and may disallow fees that were unnecessarily and unreasonably incurred." In considering the factors of I.R.C.P. 54(e)(3), the Court may use information from its "own knowledge and experience," or from information contained in the record, or information supplied by the party requesting the fees. *Hackett v. Streeter*, 109 Idaho 261, 264, 706 P.2d 1372, 1375 (Ct.App.1985).

The Court has considered the factors set forth in 54(e)(3), and specifically subparagraphs (A), (B), (C) (D), (E), (G), (I), (J), (K), and (L). [7]

a. Attorneys and Paralegal Rates.

First, the Court finds that the hourly rates for attorney fees and paralegal fees by Monsanto's counsel are reasonable when compared to those normally and customarily charged by counsel in Southeastern Idaho.

This Court has previously held that a reasonable and customary rate for seasoned trial counsel in Southeastern Idaho was between $185.00 and $225.00 per hour.[8] *See Hard Rock Horizontal Boring, Inc. v. Edstrom Construction, Inc. and Insurance of the West*, Franklin County Case No. CV-2006-342, Memorandum Decision and Order on Attorney Fees and

[7]Although the Court considered subparagraphs (F) and (H), both were found to be of little assistance to the Court in determining a reasonable amount for the attorney fees in this particular case. Further, there was little, if any, discussion regarding these factors in either the briefing or the parties' argument.

[8]At oral argument, Counsel for SIO argued that local counsel, David P. Gardner, when queried by counsel regarding the reasonableness of counsel for Monsanto's attorney fee rate, responded that it was a little bit high. Such a conclusion would not be consistent with this Court's experience and previous determinations. It is also noteworthy that this Court recently received a cost bill from Mr. Gardner's firm on a Motion to Compel, reflecting that a colleague of Mr. Gardner's, Ed Cather, was charging attorney fees of $200.00 per hour in the case of *D.L Evans Bank v. Clark*, Bannock County Case CV-2010 1114. The Court would note that Mr. Cather, while very competent and skilled, has considerably less experience than either Mr. Budge or Mr. Nye.

Costs, p. 13. The Court has previously upheld requests for attorney fees by seasoned trial counsel in other proceedings. These awards include the following: Randall C. Budge ($195.00 per hour in *Stoddard v. Beus*, Caribou County Case CV-2009-0000357; Ron Kerl ($200.00 per hour in *Jimerson v. Boyack*, Franklin County Case CV 2010-286); James G. Reid ($225.00 per hour in *Shore v. Bokides*, Franklin County Case CV-2008-327); Michael D. Gaffney ($200.00 per hour in *Hard Rock Horizontal Boring Inc. v. Edstrom Construction, Inc.*, Franklin County Case No. CV-2006-342); and Matthew L. Walter ($185.00 in *Daryl Godfrey and Sons v. Scoular Inc.*, Caribou County Case No. CV-2009-191). This is a small, but representative, sample of fee awards that this Court has considered and granted.[9]

The Court also concludes that the rates charged by associate attorneys and paralegals are also reasonable and within the range charged by counsel with similar experience and paralegas in Southeastern Idaho. *See* Court's decisions in *Hard Rock Horizontal Boring Inc. v. Edstrom Construction, Inc. and Insurance of the West, Franklin County* Case No. CV-2006-342 and *Daryl Godfrey and Sons v. Scoular Inc.*, Caribou County Case No. CV-2009-191.

Second, the Court also concludes that the hourly rates for attorney fees and paralegal fees by WGI's counsel are reasonable. SIO argues that WGI's attorney fees are not reasonable for the geographic area, Southeastern Idaho, and relies upon the case of *Lettunich*

[9]The Court does not find persuasive SIO's comparison between the rates charged by Monsanto's counsel's firm in the present case and the rates it charged in *Shields v. GMAC Mortgage, LLC*. There can be a multitude of reasons why a law firm would charge one (1) client a different rate than another. Because of the competition for the work and industry standards, law firms frequently charge less for insurance defense work than other commercial litigation. It was represented that Monsanto and its law firm in this litigation have a longstanding attorney/client relationship. It is certainly expected in a longstanding relationship, where both parties have a mutual satisfaction regarding the relationship and the quality of the work product, that there will be an expectation that there will be periodic reviews and increases in the cost of services. Whereas other clients, who may be new or less established, may be charged a lesser rate to retain the work and achieve the recognition necessary for long term retention and establishment of the relationship. As such, comparing the rates charged in one (1) case, such as *Shields v. GMAC Mortgage, LLC*, is certainly not determinative and without more information is of marginal value in the Court's I.R.C.P. 54(e)(3) analysis.

v. Lettunich, 145 Idaho 746, 185 P.3d 258 (2008) (*Lettunich*) to support this contention. However, in *Lettunich*, the Idaho Supreme Court stated as follows:

> The bottom line in an award of attorney fees is reasonableness.... The pertinent geographic area is the area from which it would be reasonable to obtain counsel. Judicial Districts were drawn in order to facilitate court administration, not to provide a factor for determining a reasonable attorney fee. Attorneys routinely practice law in more than one judicial district.

145 Idaho at 750-51. This Court concludes that it is not unreasonable, considering the facts of this case and the factors outlined in I.R.C.P. 54(e)(3), for WGI to obtain counsel from Boise, Idaho to represent its interest in this proceeding. The amount in controversy was alleged to be in excess of $25,000,000.00. In light of the potential exposure, one cannot be faulted in seeking out competent and qualified counsel. The Court concludes that it was not unreasonable, in light of the issues in dispute and the amount in controversy, for WGI to seek out counsel that it had a longstanding relationship with, as well as a high level of confidence and trust. Similarly it would not be unreasonable in a case such as this to seek out counsel in Salt Lake City, Utah. This Court has been involved in complex litigation with counsel from both Salt Lake City, Utah and Boise, Idaho. The Court concludes that the rates charged by WGI's counsel in this case, are consistent with the rates charged by Boise and Salt Lake City Counsel. These include Hawley Troxell Ennis & Hawley (separate litigation); Elam Burke, PA; Moffat Thomas Barrett Rock & Fields; and Ringert Law Chartered (Boise firms) and Ray Quinney & Nebeker; Dart Admson & Donovan; Durham Jones & Pinegar, P.C.; and Van Cott, Bagley, Cornwall & McCarthy (Salt Lake City Firms).

b. Reasonableness of Attorney Fees

The Court finds, upon a complete and exhaustive review of the attorney fees Monsanto paid to its counsel in defense of this litigation, as well as the factors set forth in

I.R.C.P. 54(e)(3) as addressed above, that Monsanto's claimed fees will be reduced. Monsanto has requested that it receive attorney and paralegal fees in the sum of $106,714.50. *See* Monsanto's Memorandum of Fees and Costs, p.2. The support for this request for attorney fees is contained in Exhibit "A" to the Affidavit of Randall C. Budge in Support of Motion for Fees and Costs. Again, after consideration of the factors set forth in I.R.C.P. 54(e) and a complete review of the time records, the Court will award Monsanto the sum of **$76,928.50** in attorney fees. The Court concludes that this is a reasonable sum for attorney fees expended by Monsanto to defend this litigation and obtain dismissal of SIO's various claims by way of summary judgment.

It is not the intent of the Court to go through and itemize, entry by entry, how the Court reached this determination. However, the Court will attempt to give some insight by way of example. The Court determined that some time entries appeared to be excessive based upon the work product in the Court's file and this Court's experience with what time should be expended on these types of issues.[10] The Court, in evaluating the entire cost bill, determined that there appeared to be instances of duplication of time and effort and the Court made appropriate adjustments. There were time entries that the Court concluded were more clerical or paralegal in nature and therefore, more properly the function of clerical staff rather than attorneys.[11] There were many entries which were block billed in such a manner that it made it extremely difficult for the Court to determine whether the amounts billed were reasonable in light of the work recorded. In some instances, the Court made what it felt to be

[10]The Court reduced the time associated with preparation of the summary judgment motion. In some instances it appeared that this work was duplicative and excessive. The same can be said for preparation of discovery and receipt and review of discovery responses from SIO. Again, there appeared to excessive work and often multiple attorneys were working on the same discovery, in some instances three (3) different attorneys.

[11]The majority of these reductions, but not all, involved what SIO referenced to be a "massive indexing" project undertaken by Mark Schaefer. The Court agrees that this project did appear to be a project more in line with the functions of a paralegal and the Court reduced sixty-seven (67) of these hours from Mr. Schaefer's attorney rate to the standard paralegal rate of $85.00 per hour.

appropriate adjustments. In a very few instances there were billings that appeared to have been incorrectly billed to this file.[12]

In considering the factors set forth in I.R.C.P. 54(e)(3) generally, the time and labor required, the skill requisite to perform the legal service properly, the amount involved and the results obtained, the Court concludes, in the exercise of its discretion and with knowledge and understanding of the applicable legal standards, that a reasonable attorney fee in the amount of **$76,928.50** will be awarded to Monsanto as the prevailing party in its litigation with SIO, pursuant to I.C. §12-120(3).

The Court also finds, upon a complete and exhaustive review of the attorney fees WGI paid to its counsel in defense of this litigation, as well as the factors set forth in I.R.C.P. 54(e)(3) as addressed above, that WGI's fees will be reduced. WGI has requested that it receive attorney and paralegal fees in the sum of $103,310.88. *See* WGI's Memorandum of Costs and Attorney Fees p.3. The support for this request for attorney fees is contained in Exhibit "E" to the Affidavit of Eugene A. Ritti in in Support of Washington Group International's Motion for Costs and Attorney Fees. Again, after consideration of the factors set forth in I.R.C.P. 54(e) and a complete review of the time records, the Court will award WGI the sum of **$85,200.00** in attorney fees. The Court concludes that this is a reasonable sum for attorney fees expended by WGI to defend this litigation and obtain dismissal of SIO's various claims asserted against it by way of summary judgment.

As with the Court's analysis regarding adjustments made to Monsanto's request for attorney fees, the Court will not itemize, entry by entry, how the Court reached this

[12]Two such instances are the time entries on August 8, 2011 and September 14, 2011. The first of these entries reflects a "telephone conference and letter to R. Ling – follow up on Basterechea Temporary Access Agreement" and the second, a time entry on September 14, 2011, where the time entry reflects, "communicate (outside counsel) – telephone conference with and letter to D. Howell and Pacificorp counsel regarding removal of irrelevant record material from Appellate record."

determination. However, the Court similarly determined that some time entries appeared to be excessive based upon the work product in the Court's file and this Court's experience with what time should be expended on these types of issues. *See* footnote 9. The Court, in evaluating the entire cost bill, determined that there appeared to be instances of duplication of time and effort and the Court made appropriate adjustments. There were time entries that the Court concluded were more clerical or paralegal in nature and therefore more properly the function of clerical staff rather than attorneys. There were many entries which were block billed in such a manner that it made it extremely difficult for the Court to determine whether the amounts billed were reasonable in light of the work recorded.[13] In some instances the Court made what it felt to be appropriate adjustment.

In considering the factors set forth in I.R.C.P. 54(e)(3) generally, the time and labor required, the skill requisite to perform the legal service properly, the amount involved and the results obtained, the Court concludes, in the exercise of its discretion and with knowledge and understanding of the applicable legal standards, that a reasonable attorney fee in the amount of **$85,200.00** will be awarded to Monsanto as the prevailing party in its litigation with SIO, pursuant to I.C. §12-120(3).

CONCLUSION

Based upon the foregoing, and pursuant to Rule 54(d) and (e) of the Idaho Rules of Civil Procedure and Idaho Code §12-120(3), the Court concludes that Monsanto and WGI are both the prevailing party in their respective litigation with SIO. As the prevailing party in this litigation, Monsanto's and WGI's request for costs and attorney fees are **GRANTED**. Based upon the reasoning set forth above, the Court concludes that Monsanto is entitled to an

[13]However, in many instances where block billing occurred, the block bill was broken down within the entry into multiple tasks with an appropriate time entry for each task. This was noted and appreciated by the Court.

award of costs in the sum of **$1,143.92.** Likewise, WGI is entitled to an award of costs in the sum of **$1,281.83.** In addition, as the prevailing party in this litigation, Monsanto is entitled to an award of reasonable attorney fees pursuant to I.C. §12-120(3) and I.R.C.P. 54(e) in the sum of **$76,928.50.** WGI is entitled to an award of reasonable attorney fees pursuant to I.C. §12-120(3) and I.R.C.P. 54(e) in the sum of **$85,200.00.**

This results in a total award of costs and attorney fees in favor of Monsanto and against SIO in the amount of **$78,072.42** and a total award of costs and attorney fees in favor of WGI against SIO in the amount of **$86,481.83.**[14] The Court, upon submission of an appropriate form of judgment pursuant to I.R.C.P 77(d), reflecting the foregoing award of costs and attorney fees, will review and sign the same.

IT IS SO ORDERED.

Dated this 8th day of March 2012.

Mitchell W. Brown

MITCHELL W. BROWN
District Judge

[14]The Court recognizes that this matter was resolved at the summary judgment stage. This issue was raised and argued by SIO in support of its claims that the attorney fees of both parties are excessive for a case which was concluded at the summary judgment stage. However, the Court also notes that this matter involved claims of SIO wherein it claimed damages in excess of $25,000,000.00. Significant effort was expended by both Monsanto and WGI to defend against these claims. Despite the fact that Monsanto and WGI were dismissed incident to summary judgment, one cannot expect them to rely upon obtaining summary judgment. In other words it was not only prudent, but necessary that they continue to prepare for trial while pursuing summary judgment.

CERTIFICATE OF MAILING/SERVICE

The undersigned certifies that on the 9th day of March, 2012, she caused a true and correct copy of the foregoing Memorandum Decision and Order on Defendants' Motions for Costs and Attorney to be served upon the following persons in the following manner:

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DEFENDANT ATTORNEY:
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VEDA MASCARENAS, Clerk

By: Blaine Ingram
Deputy Clerk

ADDENDUM
B

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IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF CARIBOU

SILICON INTERNATIONAL ORE, LLC, An Idaho limited liability company, Plaintiff, vs. MONSANTO COMPANY, a Delaware Corporation, and WASHINGTON GROUP INTERNATIONAL, INC., an Ohio Corporation, Defendants.	**CASE NO. CV-2009-366** **JUDGMENT**

Pursuant to the Memorandum Decision and Order on Defendants' Motions for Costs and Attorney Fees entered on March 8, 2012 in the above captioned case ("Memorandum Decision"), the Court awarded attorney fees and costs against Plaintiff Silicon International Ore, LLC and in favor of Defendant Monsanto Company ("Monsanto") in the amount of $78,072.42, and also in favor of Defendant Washington Group International, Inc. ("WGI") in the amount of $86,481.83. Based upon the Memorandum Decision and the record herein, Defendants Monsanto and WGI are entitled to Judgment according to law for said amounts together with interest at the statutory rate from March 8, 2012, until paid.

WHEREFORE, by virtue of the law and by reason of the premises aforesaid;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. That judgment is hereby entered against Plaintiff Silicon International Ore, LLC in favor of Defendant Monsanto in the sum of **SEVENTY-EIGHT THOUSAND SEVENTY-TWO AND 42/100 DOLLARS ($78,072.42)** lawful money of the United States of America together with interest at the statutory rate from March 8, 2012, until said Judgment and all post-judgment interest, fees and costs are paid.

2. That judgment is hereby entered against Plaintiff Silicon International Ore, LLC in favor of Defendant WGI in the sum of **EIGHTY-SIX THOUSAND FOUR HUNDRED EIGHTY-ONE AND 83/100 DOLLARS ($86,481.83)** lawful money of the United States of America together with interest at the statutory rate from March 8, 2012, until said Judgment and all post-judgment interest, fees and costs are paid.

3. The Clerk is directed to issue such Writs of Execution, Orders for Possession, Writs of Assistance and/or other such documents and/or orders as necessary to enforce and effectuate the terms of this Judgment.

4. Defendants Monsanto and WGI are further entitled to recover all additional costs incurred after the date of this Judgment for execution and enforcement of this Judgment as may hereafter approved by the Court, which amount shall be deemed added to the Judgment and collected by the Sheriff, in addition to the amount stated herein in favor of Monsanto and WGI, under applicable law including, but not limited to, Idaho Code § 12-120(5).

LET EXECUTION ISSUE HEREON.

DATED this 20th day of March, 2012.

Mitchell W. Brown

MITCHELL W. BROWN
District Judge

STATE OF IDAHO
COUNTY OF CARIBOU } SS.

I HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS A FULL TRUE AND CORRECT COPY OF THE ORIGINAL AS THE SAME APPEARS OF RECORD OR ON FILE IN THIS OFFICE.
IN WITNESS THEREOF, I HAVE HEREUNTO SET MY HAND AND AFFIXED THE OFFICIAL SEAL OF THIS OFFICE AT SODA SPRINGS, IDAHO, THIS 20th DAY OF March 20 12

Veda Mascarenas
Clerk of the District Court
Deputy Clerk

CLERK'S CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 30th day of March, 2012, I served a true and complete copy of the foregoing document on the following persons in the manner indicated:

Randall C. Budge
Racine, Olson, Nye, Budge & Bailey
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Deputy Clerk